STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

North Shore Gas Company and The Peoples Gas Light and Coke Company	))	
Petition pursuant to Section 19-140 of the Public Utilities Act to Submit an On-Bill Financing Program	)))	Docket No. 10-0090

BRIEF ON EXCEPTIONS OF THE PEOPLE OF THE STATE OF ILLINOIS

Pursuant to the Illinois Commerce Commission ("Commission" or "ICC") rules of practice, 83 Ill. Admin. Code § 200.830, and the Administrative Law Judges ("ALJs") Schedule of February 18, 2010, the People of the State of Illinois ("the People"), through Attorney General Lisa Madigan ("AG") submits their Brief on Exceptions in this proceeding. This brief takes exception to certain conclusions in the ALJs Proposed Order ("PO") of April 16, 2010 regarding North Shore Gas Company ("North Shore") and the Peoples Gas Light and Coke Company ("Peoples Gas") (North Shore and Peoples Gas, together, "North Shore/Peoples Gas," "NS/PGL," or "the Company") and its petition for approval of an On-Bill Financing Program ("OBF Program" or "Program"). The People respectfully request that the Commission adopt the modifications to the Proposed Order set forth below in its Final Order in this proceeding.

The People also request, pursuant to Section 9-201(c) of the Public Utilities Act ("PUA or "Act"), 220 ILCS 5/101 *et seq.* that they be given the opportunity to present oral argument on the issues of a Budget Cap (to estimated Program costs), Underwriting Criteria (credit checks), and Security Interest.

INTRODUCTION

The People and other intervenors have been clear throughout the workshop process that the Program needs to be cost effective to the participants as well as ratepayers. This threshold condition stems from the General Assembly's core requirement that all rates or charges demanded for any service rendered or to be rendered by a public utility shall be just and reasonable, that unjust or unreasonable charges are unlawful, and that all rules and regulations made by a public utility affecting or pertaining to its charges to the public shall be just and reasonable. 220 ILCS 5/9-101.

As the Commission reviews the proposed programs, it is important to keep in mind that Section 19-140 of the Act permits utilities to recover "all of the prudently incurred costs of offering a program approved by the Commission pursuant to this Section, including, but not limited to, all start-up and administrative costs and the costs for program evaluation." 220 ILCS 5/19-140(f). This means that *all* of NS/PGL residential ratepayers, whether they take advantage of the program or not, will have their rates adjusted to cover the costs of an on-bill program through Rider EEP. *Id.* The changes in customer rates associated with the recovery of on-bill program costs are "rates" just like other charges on a customer's bill. As such, those rates must be "just and reasonable.

That the most fundamental principle underlying the Commission's ratemaking responsibilities applies to its jurisdiction over the On-Bill Financing programs cannot be in dispute. Notwithstanding these concerns, the Petition of North Shore/Peoples Gas proposes estimated program costs at $2.705 million, or approximately 108% of the $2.5 million amount provided for the Program under Section 19-140(c)(7) of the Public

Utilities Act ("PUA" or "Act"). The Company's proposal to spend more on the administration of the program than the total pool of money available is absurd by any measure and the Commission should reject these proposed costs. Not only is the People's position that program costs should not exceed program benefits consistent with Section 9-101's "just and reasonable" standard, it is further supported by rules of statutory construction.

> Although the legislative intent is sought primarily from the language employed in the statute, the judiciary may look also to the statutory objective and the evils sought to be remedied and then arrive at a common-sense construction. [citation omitted] Where several constructions may be placed upon a statute, the court should select that interpretation that leads to a logical result and avoid that which would be absurd, for the presumption exists that the legislature in passing a statute did not intend absurdity, inconvenience, or injustice. *People v. Mullinex*, 125 Ill.App.3d 87, 89 (2nd Dist. 1984).

The Proposed Order's interpretation of the Commission's duty under the Public Utilities Act ("PUA" or "Act") is, in contrast, wholly at odds with the "just and reasonable" standard that governs all Commission decisions. The Order's repeated deference to the judgment of the sponsoring utilities and the program's yet-to-be-determined lenders to determine the operating parameters of the program abdicates the Commission's ultimate responsibility to ensure that the program's rates are lawful and that the program itself comports with the Act. Furthermore, the Order's failure to scrutinize specific critical components of the North Shore/Peoples Gas proposed program is tantamount to interpreting the General Assembly's reference to "Commission-approved" on-bill programs as a task on a checklist rather than a directive to ensure that ratepayer dollars are spent wisely. *See* 220 ILCS 5/16-111.7(b) and 220 ILCS 5/19-140(b).

Instead of adopting the Proposed Order's recommendations regarding administrative costs, the Commission should: 1) cap all program administrative costs at no grater than 10% of the program dollars available; or 2) deny approval of the North Shore/Peoples Gas Program and direct them to re-submit their proposed Program including reasonable program administrative costs.

In addition to its excessive proposed program costs, the North Shore/Peoples Gas program was deficient in other areas. As discussed further below, the utility: 1) did not include sample contracts and agreements as required under 220 ILCS 5/19-140 (d)(4); 2) submitted a Program Design Document lacking in sufficient detail to properly align incentives among the Lender ("FI" or "Lender"), vendor, and North Shore/Peoples in order to keep the program costs reasonable, avoid customer confusion, and provide enough customer benefits to make the Program worthwhile; and 3) provided a Request For Proposal ("RFP") that reads more like a Request For Information ("RFI") and lacks sufficient specific detail for a Lender to understand what the program will include or what the Lender's obligations will be. The lack of detail is particularly troublesome in regard to the proposed excessive program costs and the alignment of incentives associated with a security interest and underwriting criteria (credit checks). Accordingly, the Commission should require North Shore/Peoples Gas to make the changes described below before approving the Company's Program.

EXCEPTIONS

EXCEPTION #1: The Commission should: 1) cap all program administrative costs at no grater than 10% of the program dollars available; or 2) deny approval of the North Shore/Peoples Gas Program and direct them to re-submit their proposed Program including reasonable program administrative costs.

A. Budget Cap

The Proposed Order states, "The AG's request to cap Program Fees at 10% of the Program dollars is denied. It is contrary to the express statutory language that the utilities are allowed to recover all of their prudently incurred costs." PO at 33. This narrow view of Section 16-140 should be rejected. It is both inconsistent with prior Commission rulings that capped administrative expenses in energy efficiency programs, as well as principles of statutory interpretation.

As previously noted in the People's Initial Comments:

> North Shore/Peoples Gas estimates its three-year program costs at $2.705 million, or approximately 108% of the $2.5 million amount provided for the Program under Section 19-140(c)(7) of the Public Utilities Act.

AG Reply Comments at 8.

The Company's proposal to spend more on the administration of the program than the total pool of money available is absurd. In construing a statute, courts presume that the legislation did not intend absurdity, inconvenience or injustice. *DeLuna v. Burciaga*, 223 Ill.2d 49, 60, 857 N.E.2d 229 (2006). Requiring ratepayers to pay more in administrative costs for a program than the energy efficiency investment dollars to be provided through the program can only be characterized as absurd in every respect.

As noted above in the Introduction of these Exceptions, the Commission has an obligation to ensure that the charges assessed ratepayers are just and reasonable. 220 ILCS 5/9-201. Both Section 16-140 and the Public Utilities Act as a whole demand that the Commission approve only cost-effective on-bill financing programs proposed by Illinois utilities. As the Commission reviews the proposed programs, it is important to keep in mind that Section 16-140 of the Act permits utilities to recover "all of the prudently incurred costs of offering a program approved by the Commission pursuant to this Section, including, but not limited to, all start-up and administrative costs and the costs for program evaluation." 220 ILCS 5/19-140.7(f). This means that *all* of North Shore/Peoples residential ratepayers, whether they take advantage of the program or not, will have their rates adjusted to cover the costs of an on-bill program through Rider EEP. *Id.* The changes in customer rates associated with the recovery of on-bill program costs are "rates" just like other charges on a customer's bill. As such, those rates must be "just and reasonable." This position is supported by Section 9-101 of the PUA, which states:

> All rates or other charges made, demanded or received by any product or commodity furnished or to be furnished or for any service rendered **or to be rendered shall be just and reasonable**. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. All rules and regulations made by a public utility affecting or pertaining to its charges to the public shall be just and reasonable. (emphasis added)

220 ILCS 5/9-101.

Only prudently incurred expenses are recoverable from ratepayers. While not *specifically* provided in Section 16-140, it is the Commission's duty to establish limits *up front* some sort of guidance on permissible spending for administrative costs of the program so that a utility has some idea as to what amount can and should be spent on a

proposed on-bill program. Neither ratepayers nor the utilities benefit if the Commission gives the green-light on excessive spending. Unfortunately, the Proposed Order's refusal to provide such guidance in numerous areas of the proposed program jeopardize both ratepayers as a whole, and the individuals who take advantage of OBF Programs. Acceptance of anything less than cost-effective on-bill-financing programs jeopardizes the OBF Program as a whole, and the future evaluation of energy efficiency spending by the General Assembly.[1]

Simply because Section 16-140 provides no *explicit* cap on the administrative costs of an on-bill-financing program does not mean the Commission should wait until the reconciliation stage of a rider proceeding, as the Proposed Order recommends, to provide direction and guidance to a utility offering the programs as to what constitutes reasonable spending. There is plenty of Commission precedent for doing just that. For example, in the 2007 Peoples Gas Light & Coke Company/North Shore Gas Company consolidated rate case, the Commission capped administrative costs of the proposed utilities' program at 5 percent, despite the fact that there was no statutory cap, let alone a gas energy efficiency statute at the time, prescribing appropriate cost caps. ICC Docket Nos. 07-0241, 07-0242, Order of February 5, 2008 at 138. Similarly, in the most recent Northern Illinois Gas Company ("Nicor") rate case, the Commission approved a 5% cap on administrative costs in Nicor's proposed program, again, despite the fact that at the time there was no statutory cap, let alone a gas energy

[1] Section 19-140 requires an independent evaluation of on-bill programs after 3 years of a program's operation. The evaulator's report must be supplied to the Commission no later than 4 years after the date on which the program commenced, to be followed by a Commission report to the General Assembly. 220 ILCS 5/19-140(g).

efficiency statute at the time. ICC Docket Nos. 08-0363, Order of March 25, 2009 at 151, 156-159. The Commission also concluded that a rulemaking should commence to establish specific guidelines for gas energy efficiency programs. In doing so, the Commission noted that "utilities need to know that what they spend will not be subject to an arbitrary prudency review." *Id.* at 159.

This docket is the opportunity for the Commission to establish some sort of boundaries or guidance on permissible program costs of on-bill financing programs. The Commission's final Order should: 1) cap all program administrative costs at no grater than 10% of the program dollars available; and 2) direct North Shore/Peoples to re-submit their proposed Program including reasonable program administrative costs.

For all the forgoing reasons, The Proposed Order should be revised to provide for just and reasonable program costs associated with North Shore/Peoples Program. Therefore, the People propose that Section IX. F. at page 33 be modified as shown below.

> The AG's request to cap Program Fees at 10% of the program dollars is reasonable and necessary to insure costs associated with the Program in the form of rates passed through to ratepayers as Program costs are just and reasonable. ~~is denied. It is contrary to the express statutory language that the utilities are allowed to recover all of their prudently incurred costs.~~ Furthermore, ~~A~~all costs that the utilities seek to recover from ratepayers will be subject to a prudency review in the annual reconciliation proceeding for the utility's automatic adjustment clause rider.
>
> ~~Any estimates that the utilities' have provided are merely informational. The Commission's approval of the OBF program does not include approval of the associated proposed budget amounts.~~

EXCEPTION #2: The Underwriting Criteria (Credit Checks) section of the Proposed Order fails to take into account the best interest of participants and ratepayers and does not ensure the proper alignment of incentives.

B. Underwriting Criteria

The NS/PGL RFP states, "The Act [220 ILCS 5/19-140 et. seq. ("OBF Law")] provides that the Utilities are responsible to establish Loan underwriting guidelines, subject to approval of the Commission." NS-PGL-Ex.1.1 Annex A to the Program Design document at 6. Additionally NS/PGL state in their Preliminary Term Sheet & Underwriting Criteria section:

> **Estimated Underwriting Criteria, Residential**: To be finalized with FI. Estimated and potential underwriting criteria are as follows.
> • Eligible borrower, including confirmation that borrower is property owner
> • Minimum FICO credit scores of ___ [620 to 640], to be determined.
> Confirmation of income (performed by Lender).
> • Debt ratio to disposal income no greater than ___ [50%]. Note: Disposable income calculation to include a prudent fraction, e.g., 70%, of estimated energy cost savings associated with the project.
> • Fixture filing (UCC-1) on project equipment.
> • Possible additional criterion, to be discussed: current on utility bill payments and no more than ___ [4] late pays over the last ___ [12] month period, as confirmed by the utility. Use of this criterion may vary by utility.

Id. at 15.

This statement implies that the Commission has no control or can offer no guidance over what terms are appropriate given the statute. The People respectfully disagree. The People believe there is a great benefit in establishing credit check guidelines for the utility-issued RFP's in an effort to ensure that the interest of limiting ratepayer risk for default loans is balanced with the desire to enable as many ratepayers as possible to qualify for the on-bill loans. Otherwise the FI would likely have a financial incentive to increase their profits through cost intensive credit checks that inflate program

cost fees passed through to rate payers without a corresponding benefit to reducing bad debt exposure.[2]

CUB too is concerned that the credit check practice "will add unnecessary costs to the Program." CUB/City Initial Comments at 6. Additionally, CUB is concerned that people that could benefit from energy efficiency measures could be denied access to the [P]rogram because they have than ideal credit scores, even though it was demonstrated at the workshop process that individuals with poor credit scores still often pay their utility bills. *Id.*

The Proposed Order states, "The FI is guaranteed to recover its investment pursuant to the statutory scheme and it [is the] ratepayers that will be left footing the bill for bad loans" Proposed Order at 33. The Proposed Order, however, misses the bigger risk here. If the FI receives substantial profit in the form of credit check fees than quality participants may be excluded from the Program and it is the rate payers that will be left footing the bill for expensive credit checks that provide minimal value.

The People recommended in their Reply comments that:

> the Commission should require the Petitioner to apply a tiered credit check approach that: 1) limits the requirement to prior bill payment history for measures under a $1,000; and 2) applies a specific formula or methodology that does not inflate the interest rate or cause additional costs to be socialized to rate payers for measures greater than $1,000. The specific credit check methodology should be stated clearly in the Program Design Document, as well as the RFP, NS-PGL-Ex.1.1 Annex A to the Program Design Document.

AG Reply Comments at 5.

[2] NS/PGL witness Vincent Gaeto stated, "We are seeking Commission approval of the draft [RFP] and the process and terms defined therein. FI [Lender] proposal evaluation criteria are well defined, including a scoring system" NS-PGL Ex. 1.0 at 8. However, the Proposal Evaluation Worksheet values Program fees to be paid by Utilities at just 5%. NS-PGL-Ex.1.1 Annex B Proposal Evaluation Worksheet to the Program Design document at 16.

The PO should be revised to take into account the best interest of participants and ratepayers allowed for under the OBF Law and assure the proper alignment of incentives. Therefore, the People propose that Section IX. C. at page 32 be revised as shown below.

> Several options have been proposed for determining the credit-worthiness of potential program participants. The Commission agrees with ~~the Utilities~~ the People and NS/PGL is directed to apply a tiered credit check approach that: 1) limits the requirement to prior bill payment history for measures under a $1,000; and 2) applies a specific formula or methodology that does not inflate the interest rate or cause additional costs to be passed through as program costs for measures greater than $1,000. ~~however, that this is a matter best left to the FI. In fact, the statute itself recognizes that the FI will be conducting credit checks or other appropriate measures to limit credit risk. The FI should utilize its expertise to determine what measures should be taken to limit credit risk.~~
>
> ~~Ensuring that only credit-worthy customers participate in the program is in the best interest of ratepayers. The FI is guaranteed to recover its investment pursuant to the statutory scheme and it ratepayers that will be left footing the bill for bad loans.~~

EXCEPTION #3: The Commission should direct NorthShore/Peoples to reflect in its RFP and contracts or agreements when it would exercise its right to obtain a security interest.

C. Security Interest

The PO states, ”[t]he AG’s suggestion that the Utility should be barred from any costs related to filing a security interest is contrary to the statutory scheme and fails to protect ratepayers.” PO at 33. As described in the On- Bill law, “the electric utility shall retain a security interest in the measure or measures purchased under the program” 220 ILCS 5/19-140(c)(6). No party or Staff ever disputed the statutory right of NS/PGL to obtain a security interest.

Instead the People stated,

> Petitioner must spell out its reasoning clearly in the Program Design Document as to what exactly "cost-effective methods" to obtain a security interest means. In addition, any request by the Petitioner to the lender related to security interest filings through the RFP process must provide a cost breakdown by the lender. RFP, NS-PGL-Ex.1.1 Annex A to the Program Design Document. At this point [Prior to the utilities filing their Comments in this docket] the Commission should disallow any costs associated with obtaining a security interest as not "prudently incurred costs of offering a program approved by the Commission pursuant to this Section…" 220 ILCS 5/19-140(f).
> AG Reply Comments at 9.

The Proposed Order states that, "it is left to the utility to attempt to collect as much money from the individual participant or, if necessary, attempt to repossess the item. Proposed Order at 33. The People, however, believe that this is true to the extent that the cost associated with filing, perfecting, repossessing, storing and selling a measure is reasonable compared to the amount a utility may potentially recover.

The Company merely states, "The utility [NS/PGL] intends to work with the FI to address the security interest that the law grants" NS-PGL Ex. 1.0 at 10. It is up to NS/PGL, however, to spell out their methodology to the FI through the RFP and associated contracts agreements as to when NS/PGL will require the FI to perfect a security interest and not the other way around. If the FI receives substantial fees associated with security interest filings without a clear methodology than incentives would be misaligned.

It is up to NS/PGL to spell out their methodology to the FI through the RFP and associated contracts agreements as to when NS/PGL will require the FI to perfect a security interest, and not the other way around. Incentives are misaligned if the FI

receives substantial fees associated with security interest filings, but a clear methodology as to when it would exercise its right to perfect such interests is not provided.

The AG never disputed NS/PGL statutory right to a security interest under the OBF Law. Instead the People, believe NS/PGL needs to reflect in their RFP, contracts or agreements *filed with the Commission and prior to approval of their Program* when it would exercise its discretion to obtain a security interest.

The PO should be corrected to maintain accuracy and not misstate the position of a party. Additionally, the PO should be revised to take into account the best interests of participants and ratepayers allowed for under the OBF Law and assure the proper alignment of incentives. Therefore, the People propose that Section IX E. at page 33 be corrected as shown below.

> The statute gives the utilities the right to retain a security interest in the financed energy efficiency measures. ~~The fact that utilities are given this right, and not the FI, is consistent with the statutory scheme that utilities pay the FI whether or not the individual participant pays his or her utility bill.~~ Accordingly, it is left to the utility to attempt to collect as much money from the individual participant or, if necessary, attempt to repossess the item, but only to the extent such associated costs are reasonable compared the amount NS/PGL could potentially collect. ~~NS/PGL~~ The Commission directs NS/PGL to reflect in their RFP, contracts or agreements filed with the Commission prior to approval of their Program when it would exercise its discretion to obtain a security interest. ~~proposal to work with the FI to determine when this would be financially necessary is a reasonable approach. As Staff points out, perfecting the security interest may cost more than would be recovered.~~
>
> ~~The AG's suggestion that the Utility should be barred from any costs related to filing a security interest is contrary to the statutory scheme and fails to protect ratepayers. If the Utilities' and the FI institution determine that it makes financial sense to perfect a security interest, this protects ratepayers because any unpaid loans and any money not recovered through repossession will be charged to ratepayers.~~

EXCEPTION #4: A focused level of customer education with reasonable program costs could provide important consumer protection even though there is no statutory requirement for such education to be a part of the Company's OBF Program.

D. Customer Education

This section of the Proposed Order highlights the inconsistent interpretation of the OBF statute within the four corners of the document. As noted above, the Proposed Order rejects providing guidance to the utilities regarding permissible program costs, arguing that no such language exists in Section 19-140. On the other hand, the Proposed Order adopts Staff's recommendation to require utilities to work with Staff to develop specific information that will be provided to residential customers, despite the absence of any such requirement in the statute. *See* PO at 19; 220 ILCS 5/16-111.7 (electric) and 220 ILCS 5/19-140 (gas). "The People supported Staff's recommendation as an important consumer protection issue." AG Verified Reply Comments at 8; PO at 9 and 10.

The Proposed Order needs to be revised and modified regarding the non-statutory requirement directing NS/PGL to develop with Staff, customer education regarding the On-bill Program. Furthermore, in accordance with the AG's recommendation regarding program costs described in their Comments and in this BOE, the PO should be modified to ensure that any program costs related to customer education must be just and reasonable. Therefore, the People propose that Section IV. E. at page 15 be modified as shown below.

> The Commission finds Staff's customer education concerns to be valid. The On-Bill Financing Statute has no provision for requiring NS/PGL to develop customer education or to provide such information to its customers. ~~and~~ The Commission, however, directs the Company to work with Staff to develop the information that will be provided to

customers. The reasonable costs ~~of~~ associated with providing this information is a program cost recoverable through the utility's automatic adjustment clause tariff.

EXCEPTION #5: The Proposed Order misinterprets the Peoples position regarding being a named member or voting member of the RFP Evaluation Committee

E. FI Selection

1. Intervenors as Members of Evaluation Committee

CUB in their Comments proposed "that it, the AG and Staff be named members of the RFP Evaluation Committee" Proposed Order at 31; CUB/City Initial Comments at 8. The People in their Reply Comments were merely responding to CUB's recommendation. The People, CUB, and other entities have been involved with countless meetings, committees, and collaboratives ranging from UCB/POR to Smart Grid and the time commitment for such participation is significant. Again in response to CUB's recommendation, the People stated, "The People would be willing to join the RFP evaluation Committee, but believe that in order to make a meaningful contribution to the evaluation process, the AG and CUB should be voting members of the committee and not just advisors." AG Reply Comments at 5.

To be sure, the People are not clear what the Proposed Order means in stating "it is not clear what additional value or expertise would be brought to the OBF Program to have these parties vote on the selection of the FI[Lender]." Proposed Order at 31. On the contrary, the People believe their participation has brought significant value to the process time and time again.

The PO should be corrected to maintain accuracy and not misstate the position of a party. Therefore, the People propose that Section IX. B. 1. at page 31 and 32 be corrected as shown below.

The Commission agrees with NS/PGL that, pursuant to the statute, selecting the FI is the utility's responsibility and there is no basis for requiring the affected utilities to allow the workshop participants to participate in the selection process. ~~The AG's proposal conflicts with the statutory right/directive that the utility shall make the selection. Not only that, it is not clear what additional value or expertise would be brought to the OBF Program to have these parties vote on the selection of the FI.~~

The Commission notes that ComEd, in Docket 10-0091, proposes to update interested stakeholders throughout the RFP process concerning, for example, the types of responses it is receiving from lenders. The Commission finds this to be a reasonable solution to CUB's concern that it will not be informed of the deliberations or actions and directs NS/PGL to provide the intervenors with similar updates. Also, Staff is directed to reconvene the workshop participants after the RFP process is concluded to provide the utilities an opportunity to provide the results of the RFP process and the list of eligible measures.

G. Non-Substantive Changes

The ALJ's Proposed Order contains a non-substantive error and the People propose that the second to last paragraph for Section I. at page 1 be corrected as shown below.

220 ILCS 5/16-111.7(b-5); 220 ILCS 5/19~~/~~-140(b-5).

CONCLUSION

For the reasons discussed herein, the People respectfully request that the Commission modify the Proposed Order in accordance with the arguments and exceptions language provided herein.

Respectfully submitted,

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